A

WINSTECH ENGINEERING SDN BHD

v.

ESPL (M) SDN BHD

B

FEDERAL COURT, PUTRAJAYA
ARIFIN ZAKARIA CJ
RICHARD MALANJUM CJ (SABAH & SARAWAK)
ABDULL HAMID EMBONG FCJ
HASAN LAH FCJ
C MOHAMED APANDI ALI FCJ
[CIVIL APPLICATION NO: 08-353-05-2013(W)]
6 FEBRUARY 2014

D ***COMPANY LAW:*** *Winding up - Leave to appeal - Application for - Application filed prior to obtaining sanction by official receiver - Whether sanction applied retrospectively - Grant of leave - Whether justified - Whether respondent prejudiced by application - Companies Act 1965, ss. 226(3), 236(2)(a) & 236(3)*

E The applicant, having been wound up in 2010 and the official receiver appointed as the liquidator, filed an application for leave to appeal on 23 May 2013, without obtaining any sanction from the official receiver. After the filing of the application for leave, the applicant obtained the sanction from the official receiver on
F 19 August 2013. The respondent, vide encl. 8(a), raised a preliminary objection to the application for leave to appeal on the ground that the applicant had no *locus standi* as the application was without the sanction of the official receiver and consequently, the application was invalid and should be struck out. The
G respondent, in support of its application, relied on sub-s. 236(3) of the Companies Act 1965 ('Companies Act') to submit that it is settled law that once a limited company is wound up, its assets and liabilities vest with the liquidator appointed. On the other hand, the applicant questioned whether such consent was really
H necessary, referring to s. 38(1)(a) of the Bankruptcy Act 1967 ('Bankruptcy Act') and argued that it was not the question of sanction but rather the prerogative of the liquidator to bring any action in the name of the company. The appellant also submitted that the respondent had not been prejudiced in any way and no
I miscarriage of justice had occurred.

Held (allowing application in encl. 8(a) with costs)
Per Mohamed Apandi Ali FCJ delivering the judgment of the court:

(1) The respondent, in making the application, relied on the provisions of the Companies Act, while the applicant relied on the provisions of the Bankruptcy Act. The applicant, being a corporate person incorporated under the Companies Act, could not be a person under the Bankruptcy Act. When a specific law has been enacted pertaining to any power or right relating to legal proceedings, that specific law shall prevail over any other similar laws. Hence, for the purpose of this application, the relevant law applicable was the Companies Act. (para 18)

(2) In order for the doctrine of ratification to be applicable, the ratification must be clear. On the facts, the sanction as per the Director General of Insolvency's letter dated 19 August 2013, did not specify that it was to be retrospective. There was also no evidence to show that there was ever any application for the sanction to be retrospective. (para 20)

(3) The issue of prejudice or miscarriage of justice did not arise in the circumstances, as the applicant, on its own accord, had failed to utilise the enabling provisions of the law to commence the impugned legal proceedings. The court, in law, is not in a position to render assistance to such litigant. (para 21)

(4) In appropriate circumstances, which has to be proven, leave *nunc pro tunc* may be given under s. 236(2)(a) of the Companies Act subject to the discretion of the courts under s. 236(3) of the Companies Act. Such discretion and control by the court under s. 236(3), is to be read together with s. 226(3) of the Companies Act, notwithstanding the fact that the proceedings had already commenced (*Re Saunders (A Bankrupt), Re Bearman (A Bankrupt), Re Bristol & West Building Society v. Saunders*, foll). (para 22)

(5) In the instant case, there was no application of the sanction to be made retrospectively *ie*, there was no *nunc pro tunc* leave application. Therefore, there was no material before the court to consider and to justify a grant of a *nunc pro tunc* leave. (para 23)

Bahasa Malaysia *Translation Of Headnotes*

Pemohon, yang telah digulungkan dalam tahun 2010 dan pegawai penerima dilantik sebagai pelikuidasi, memfailkan permohonan untuk kebenaran merayu pada 23 Mei 2013, tanpa memperolehi sanksi daripada pegawai penerima. Selepas memfailkan permohonan untuk kebenaran, pemohon memperolehi sanksi daripada pegawai penerima pada 19 Ogos 2013. Responden, melalui lampiran 8(a), membangkitkan bantahan awalan kepada permohonan untuk kebenaran merayu atas alasan bahawa pemohon tidak mempunyai *locus standi* kerana permohonan tersebut adalah tanpa sanksi pegawai penerima dan dengan itu permohonan tersebut tidak sah dan wajar dibatalkan. Responden, dalam menyokong permohonannya, bersandarkan pada sub-s. 236(3) Akta Syarikat 1965 ('Akta Syarikat') untuk menghujahkan bahawa undang-undang matan bahawa sebaik sahaja sebuah syarikat berhad digulungkan, aset-aset dan liabilitinya terletakhak pada pelikuidasi yang dilantik. Sebaliknya, pemohon mempersoalkan sama ada kebenaran tersebut sememangnya diperlukan, merujuk kepada s. 38(1)(a) Akta Kebankrapan 1967 ('Akta Kebankrapan') dan menghujahkan bahawa ia bukan persoalan sanksi tetapi prerogatif pelikuidasi untuk memulakan apa-apa tindakan atas nama syarikat. Perayu juga menghujahkan bahawa responden tidak diprejudiskan dalam apa cara sekalipun dan ketidakadilan tidak berlaku.

Diputuskan (membenarkan permohonan dalam lampiran 8(a) dengan kos)
Oleh Mohamed Apandi Ali HMP menyampaikan penghakiman mahkamah:

(1) Responden, dalam membuat permohonan tersebut, bersandarkan pada peruntukan Akta Syarikat, manakala pemohon bersandarkan pada peruntukan Akta Kebankrapan. Pemohon, sebagai badan korporat yang ditubuhkan di bawah Akta Syarikat, tidak boleh terangkum di bawah Akta Kebankrapan. Apabila sesuatu undang-undang spesifik digubal berkenaan dengan apa-apa kuasa atau hak yang berkaitan dengan prosiding undang-undang, undang-undang spesifik tersebut mengatasi apa-apa undang-undang serupa yang lain. Dengan itu, bagi tujuan permohonan ini, undang-undang relevan yang terpakai adalah Akta Syarikat.

(2) Untuk doktrin ratifikasi digunapakai, ratifikasi tersebut mestilah jelas. Berdasarkan fakta, sanksi seperti dalam surat Ketua Pengarah Insolvensi bertarikh 19 Ogos 2013 tidak menyatakan bahawa ia berkuasa secara kebelakangan. Malah, tiada keterangan yang menunjukkan bahawa terdapat apa-apa permohonan untuk sanksi terpakai secara kebelakangan.

(3) Isu prejudis dan ketidakadilan tidak timbul dalam keadaan tersebut, kerana pemohon, secara sendiri, telah gagal menggunakan peruntukan-peruntukan memperbolehkan dalam undang-undang untuk memulakan prosiding perundangan yang dipersoalkan. Mahkamah, di sisi undang-undang, tidak mempunyai kedudukan untuk memberikan bantuan kepada litigan sedemikian.

(4) Dalam hal keadaan yang wajar, yang perlu dibuktikan, kebenaran *nunc pro tunc* boleh diberikan di bawah s. 236(2)(a) Akta Syarikat tertakluk kepada budi bicara mahkamah di bawah s. 236(3) Akta Syarikat. Budi bicara dan kawalan sedemikian oleh mahkamah di bawah s. 236(3) perlu dibaca dengan s. 226(3) Akta Syarikat, meskipun terdapat fakta bahawa prosiding tersebut telah pun bermula (*Re Saunders (A Bankrupt), Re Bearman (A Bankrupt), Re Bristol & West Building Society v. Saunders*, diikuti).

(5) Dalam kes ini, tiada permohonan untuk sanksi diberikan secara kebelakangan iaitu tiada permohonan kebenaran *nunc pro tunc*. Oleh itu, tiada material di hadapan mahkamah untuk pertimbangan dan sebagai justifikasi bagi memberikan kebenaran *nunc pro tunc*.

Case(s) referred to:

Alexander Ward and Co Ltd v. Samyang Navigation Co Ltd [1975] 2 All ER 424 ***(refd)***

Danish Mercantile Co Ltd and Ors v. Beaumont and Anor [1951] 1 Ch 680 ***(refd)***

Hup Lee Coachbuilders Holdings Sdn Bhd v. Cycle & Carriage Bintang Bhd [2012] 10 CLJ 88 CA ***(refd)***

Megat Najmuddin Dato' Seri (Dr) Megat Khas v. Bank Bumiputra Malaysia Bhd [2002] 1 CLJ 645 FC ***(refd)***

Re Saunders (A Bankrupt), Re Bearman (A Bankrupt), Re Bristol & West Building Society v. Saunders [1997] 3 All ER 992 ***(foll)***

Zaitun Marketing Sdn Bhd v. Boustead Eldred Sdn Bhd [2010] 3 CLJ 785 FC ***(refd)***

Legislation referred to:
Bankruptcy Act 1967, s. 38(1)(a)
Companies Act 1965, ss. 226(3), 236(2)(a), (3)

For the applicant - HL Lee; M/s HL Lee & Co
For the respondent - Wong Hin Loong (Gan Chwee Yen with him); M/s Azman Davidson & Co

[Appeal from Court of Appeal; Civil Appeal No: W-02-1192-2011]

[Editor's note: For the High Court judgment, please see Winstech Engineering (M) Sdn Bhd v. ESPL (M) Sdn Bhd [2011] 1 LNS 811.]

Reported by S Barathi

JUDGMENT

Mohamed Apandi Ali FCJ:

Introduction

[1] This is a motion taken by the respondent *vide* encl. 8(a) namely to strike out the application for leave to appeal, by the applicant. It is basically a preliminary objection to the application for leave to appeal.

[2] The only issue raised by the respondent was that applicant filed the application for leave (encl. 2(a)) without any leave from the official receiver (as liquidator of the applicant) and as such the applicant had no *locus standi* and consequently the leave application (encl. 2(a)) was invalid and should be struck out.

Salient Facts

[3] The salient facts relevant to this application are as follows:

(a) The applicant was wound up on 4 February 2010. The official receiver was appointed as the liquidator of the applicant pursuant to the winding up order on 4 February 2010.

(b) The applicant applied for leave to appeal to this court on 23 May 2013. This was done without obtaining any sanction from the official receiver.

(c) On 19 August 2013 the applicant obtained sanction from the official receiver. As can be seen from the above chronology of events, the applicant obtained the sanction from the official receiver after the filing of the application for leave to appeal to this court.

The Issue Before This Court

[4] The issue is whether the sanction by the official receiver dated 19 August 2013 have a retrospective effect, hence validating the application for leave which was filed prior to the issuance of the sanction.

Arguments Before This Court

By The Respondent

[5] In support of its contention, the respondent submitted that this issue came for consideration of the Court of Appeal in the recent case of *Hup Lee Coachbuilders Holdings Sdn Bhd v. Cycle & Carriage Bintang Bhd* [2012] 10 CLJ 88, where at pp. 92-93 Ramly Ali JCA (as His Lordship then was) held:

> An action filed by the appellant without any leave from the official assignee (as liquidator) or the court or filed by the appellant without having any locus standi to do so in law is clearly illegal and invalid.
>
> There are no provisions of law to authorise that leave or sanction of the official assignee is to have retrospective effect. The appellant lacks *locus standi* right from the time when the action was filed. Therefore the action was invalid and void ab initio. Subsequent leave or approval by the official assignee office which came more than two years later cannot legalise or validate an action which was invalid and void *ab initio*.

[6] *Hup Lee Coachbuilders Holdings Sdn Bhd v. Cycle & Carriage Bintang Bhd* went before the Federal Court for leave. Leave was refused. The two issues raised by the appellant in that particular case were:

(a) whether leave of court was required pursuant to s. 226(3) of the Companies Act 1965 for a wound up company to commence and/or continue with a legal proceeding; and

(b) whether sanction granted pursuant to s. 236(2)(a) of the Companies Act 1965 to institute, continue or defend a legal proceeding had retrospective effect.

[7] On 19 September 2013 after hearing submission from both parties, this court dismissed with costs the application for leave to appeal.

[8] The respondent went on to submit that although the applicant in this case had relied on two English cases namely *Danish Mercantile Co. Ltd and Ors v. Beaumont and Anor* [1951] 1 Ch 680 and also *Alexander Ward and Co. Ltd v. Samyang Navigation Co. Ltd.* [1975] 2 All ER 424 the facts in those cases were distinguishable from the present case simply because, in the case before this court:

(a) the applicant was wound up on 4 February 2010;

(b) the applicant's application for leave to appeal to the Federal Court was filed on 23 May 2013; and

(c) the applicant only obtained the sanction from the official receiver to file the application for leave to appeal to the Federal Court on 19 August 2013.

[9] The respondent argued that the applicant was incompetent to file the leave application in the first place since it had been wound up in the year 2010. It is settled law that once a limited company is wound up, its assets and liabilities vest with the liquidator appointed and it is up to him to decide whether to institute, continue the prosecution of, or defend legal proceedings on behalf of the wound up company. To back his argument on this issue the respondent then cross-referred to sub-s. 236(2) of the Companies Act 1965; on powers of liquidator, which reads as follows:

> (2) The liquidator may:
>
> (a) bring or defend any action or other legal proceeding in the name and on behalf of the company;.

and also two other cases namely *Zaitun Marketing Sdn Bhd v. Boustead Eldred Sdn Bhd* [2010] 3 CLJ 785, at pp. 795-796 and *Hup Lee Coachbuilders Holdings Sdn Bhd v. Cycle & Carriage Bintang Bhd* [2012] 10 CLJ 88.

[10] The respondent therefore prayed that the application for leave to appeal by the applicant be struck out with costs on the premise it is invalid and void *ab initio*.

By The Applicant

[11] The applicant, on the other hand, questioned whether such consent is really necessary. It refers to s. 38(1)(a) of the Bankruptcy Act 1967 (Act 360), which it read as follows:

> (1) Where a bankrupt has not obtained his discharge:
>
> (a) the bankrupt shall be incompetent to maintain any action (other than an action for damages in respect of an injury to his person) without the previous sanction of the Director General of Insolvency;

[12] The applicant further argued that it was not the question of sanction but rather the prerogative of the liquidator to bring any action in the name of the company. In this connection he referred to s. 236(2)(a) of the Companies Act which reads:

> (2) The liquidator may:
>
> (a) bring or defend any action or other legal proceeding in the name and on behalf of the company;

[13] At this juncture as well, the applicant also argued that the respondent is actually challenging the lawyer's authority to act in this proceeding rather than the issue of lack of sanction.

[14] The applicant highlighted the issue of prerogative of the liquidator as clearly expounded by Justice Zaki Tun Azmi and Justice Gopal Sri Ram in *Zaitun Marketing Sdn Bhd v. Boustead Eldred Sdn Bhd* [2010] 3 CLJ 785; [2010] 2 MLJ 749. In dismissing the appeal, it was held by:

Per Zaki Tun Azmi CJ:

> An appointment of an advocate by a liquidator pursuant to s. 236(2)(a) of the Companies Act does not require leave of the court because he clearly needs the services of an advocate to bring or defend a legal action. Only the appointment under s. 236(1)(e) requires the leave of the court and that is when he needs an advocate to assist him in his 'ordinary administrative and management duties of a liquidator such as those that are within his ordinary professional competence' (to borrow the words of Abdul Aziz J. I do not need to quote the full text from his judgment as my learned brother Gopal Sri Ram FCJ has done so).

Per Gopal Sri Ram FCJ:

> ... once a limited company is wound up, its assets and liabilities vest in the liquidator. It is up to him to decide whether to institute, continue the prosecution of or defend legal proceedings. However, there is jurisdiction in the Court to authorise other persons to conduct litigation in the name of the company... the court's power to authorise someone other than the liquidator to institute, continue or defend proceedings only arises where the liquidator refuses to do so and declines authority. But where, as here, the liquidator grants authorisation, there is no necessity to move the court.
>
> ...
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> Since a director - or more appropriately a former director - of a company in liquidation is not a party to the liquidation a court will not authorise him or her to launch or to continue proceedings or indeed to defend them. *A fortiori* the liquidator has no power to confer such authority, since he cannot do what the court will not do on his default. It follows that Khaidzir bin Hj Ishak ought not to have been authorised to continue with the proceedings. It may well have been different if Khaidzir bin Hj Ishak had also been a creditor or a contributory.
>
> In short, a liquidator who wishes to appoint an advocate and solicitor to prosecute, continue or defend an action by or against the company in liquidation may do so under s. 236(2)(a) without the leave of the court or the committee of inspection.

[15] Corollary to that, the applicant also submitted that the respondent had not been prejudiced in any way and no miscarriage of justice has occurred. (See *Megat Najmuddin Dato' Seri (Dr) Megat Khas v. Bank Bumiputra Malaysia Bhd* [2002] 1 CLJ 645; [2002] 1 MLJ 385.)

Our Analysis

[16] From the submissions and arguments before us, it is clear that in making this application, the respondent is relying on the provisions of the Companies Act 1965, while on the other hand, the applicant is relying on the provision of the Bankruptcy Act 1967. It is an obvious and undisputed fact that the applicant is a corporate person incorporated under the Companies Act. That being so, it is axiomatic that the applicant cannot be a person under the Bankruptcy Act.

[17] The applicant did not forward any argument as to why despite it being a corporate body the provision of the Bankruptcy Act is applicable for purposes of the pre-requisite sanction before filing any action in court. At the most, the argument was based on analogy. It is our judgment that an analogy argument will have weight if it is based on similar facts and similar legal positions but not otherwise.

[18] When a specific law has been enacted pertaining to any power or right relating to legal proceedings, that specific law shall prevail over any other similar laws. It is our judgment that for purposes of this application the relevant law applicable is the Companies Act 1965.

[19] As such, we find no reason to depart from the decision of the Court of Appeal in *Hup Lee Coachbuilders Holdings Sdn Bhd v. Cycle & Carriage Bintang Bhd* [2012] 10 CLJ 88, which this court refused leave to appeal on 19 September 2013. To recapitulate, in the above case, *inter alia*, it was held that:

> (i) The sanction granted under section 236(2)(a) of the Companies Act 1965 to bring, defend any action or other legal proceedings in the name or on behalf of the company does not have a retrospective effect.

[20] It was also argued by the applicant that by applying the doctrine of ratification, a subsequent sanction could ratify the issue of *locus standi*. To see if such doctrine is applicable in this case, it is appropriate to see the actual "sanction" given. The sanction as per the Director General of Insolvency's letter dated 19 August 2013, did not specify that it is to be retrospective. For the doctrine of ratification to be applicable, the ratification must be clear. Furthermore, in the present case, there is no evidence to show that there is ever any application for the sanction to be retrospective. In *Re Saunders (A Bankrupt), Re Bearman (A Bankrupt), Re Bristol & West Building Society v. Saunders* [1997] Ch. 60; [1997] 3 All ER 992. Lindsay J, held:

> Given the practical inconveniences I have described and the injustices that can be left without possible remedy if retrospective leave is in no case possible, I share with the Full Bench in Lahore in 1942 the view that, if the section is capable of being read more than one way, there is no doubt which way entails the

A less injustice and inconvenience. If, as I hold, the words used are in their full historical context fairly capable of bearing more than one meaning, it is legitimate for me to adopt a meaning which gives effect to the statutory purpose, rather than frustrating it, as in my view an inflexible powerlessness to give leave even in the most glaring of cases would do

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... Accordingly, I hold that leave may in appropriate circumstances be given under section 285(3), notwithstanding that the proceedings in question have already been commenced.

C ...

As for the discretion, I have earlier mentioned that the trustees in bankruptcy do not oppose the granting of leave and that it has been conceded that if the jurisdiction exists the facts are such as to justify a grant of leave *nunc pro tunc* in exercise of the discretion. I am satisfied that that is so and grant such leave.

D

[21] The issue of prejudice or miscarriage of justice does not arise in the circumstances, as the applicant, on its own accord, had failed to utilise the enabling provisions of the law to commence the impugned legal proceedings. The court, in law, is not in a position

E to render assistance to such litigant.

[22] Following *Saunders*' case, we hold the view that in appropriate circumstances, which has to be proven, leave *nunc pro tunc* may be given under s. 236(2)(a) of the Companies Act subject

F to the discretion of the courts under s. 236(3) of the Act. Such discretion and control by the court under s. 236(3) is to be read together with s. 226(3) of the Act. This is notwithstanding the fact that the proceedings had already commenced.

G **[23]** As stated earlier in this case there was no application for the sanction to be made retrospectively. In short, there was no *nunc pro tunc* leave application. As such there is therefore no material before this court to consider and to justify a grant of a *nunc pro tunc* leave.

H **[24]** For the above reasons, we allow the application in encl. 8(a), with costs.

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